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E. ROBERT SEAVER,

NO. 798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA AND COMMISSIONER OF INTERNAL REVENUE, PETITIONERS

v.

ANNE GOYNE MITCHELL, FRANCES ANGELLO, ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT ANNE GOYNE MITCHELL

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SUMMARY OF ARGUMENT

In Poe v. Seaborn, 282 U.S. 101, and the other community property cases which followed it, [1]

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[1] Goodell v. Koch, 282 U.S. 118; Hopkins v. Bacon, 282 U.S. 122; Bender v. Pfaff, 282 U.S. 127.

this Court held that spouses in community could split the community's income for tax purposes irrespective of the husband's powers of administration over the community's property. Although Seaborn held that the spouses were entitled to file separate tax returns, neither it nor any other decision of this Court has ever held that the wife in community must file a return and become separately liable for the tax.

The Louisiana community property law denies the wife the right to obtain the information necessary to file a return of the community's income and access to the community funds with which to pay the tax while permitting the husband to administer the community's property without regard to the wife's wishes.

To interpret Section 1(a) of the Code (Appendix, infra, p. 27) as imposing a requirement that the

wife file and be liable for income taxes on the community's income in view of her disabilities and her husband's powers under Louisiana law would make the Code unconstitutional in operation as it would be so arbitrary and unreasonable as to amount to a confiscation of property and a violation of the due process clause of the Fifth Amendment of the United States Constitution (Appendix, infra, p. 26).

The Fifth Circuit held in the instant case that the husband was liable for the tax on both halves of the community income and the wife was not liable for any of the tax unless she assumed such liability by filing a return or accepting the community upon its termination. That rule, which is consistent with the second ground of this Court's opinion in United States v. Robbins, 269 U.S. 315, should be affirmed.

ARGUMENT

A LOUISIANA WIFE IN COMMUNITY WHO NEITHER FILES A TAX RETURN NOR ACCEPTS THE COMMUNITY IS NOT PERSONALLY LIABLE FOR TAXES ON THE COMMUNITY'S INCOME

1. INTRODUCTION

From at least 1920 until 1924, it was the administrative policy of the Treasury Department, supported by opinions of the Attorney General of the United States, that husbands and wives in community property states, other than California, could split their communities' incomes for tax purposes.[2] In 1924, the

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[2]Cum. Bull. No. 2, p. 198 (13 - 20 - 815); Cum. Bull. No. 3, p. 221 (39 - 20 - 1218); 32 Ops. Atty. Gen. 298, Aug. 24, 1920, T. D. 3071 (Cum. Bull. No. 3, p. 221); 32 Ops. Atty. Gen. 431, Feb. 26, 1921, T. D. 3138 (Cum. Bull. No. 4, p. 238); O. D. 426, April, 1920 (Cum. Bull. No. 2, p. 1198); Regulations 62, Art. 31, 1921 Revenue Act; In 1924, the attorney general rendered an opinion to the same effect for California but withdrew it approximately three months later; Cum. Bull. No. 3 - 1, p. 91 (III - 13 - 1465); Cum. Bull. No. 3-1, p. 84

attorney general[3] authorized a test case, United States v. Robbins, supra, 269 U.S. 315, in which this Court held that the wife in California did not have a sufficient interest in the community to be permitted to return one-half of its income and that the husband was required to return it all. Following the decision in Robbins, California amended her law to state that the wife's interest was present, existing and equal with that of the husband;[4] and in United States v. Malcolm, 282 U. S. 792, after the effective date of that amendment, this Court held that Califomia

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(III - 13 - 1463); Cum. Bull. 3 - 1, p. 101 (III - 23 - 1591); See Dissent of Judge Haney in Commissioner of Internal Revenue v. Cadwallader, 127 F. 2d 547 (9th Cir. 1942).

[3]Cum. Bull. No. 4 - 1, p. 20.

[4]Civil Code of California Sec. 161(a) (Appendix, infra).

husbands and wives could split the community's income for tax purposes.

In doing so, this Court relied upon Poe v. Seaborn, supra, 282 U.S. 101, Goodell v. Koch, 282 U.S. 118, and Hopkins v. Bacon, 282 U.S. 122, which cases, along with Bender v. Pfaff, 282 U.S. 127, held that husbands and wives in Washington, Arizona, Texas, and Louisiana could split the communities' incomes for tax purposes.

In each of those cases, the issue before the Court was whether the spouses in community could split the community income. In none was the issue: whether a wife was separately and individually liable for the taxes on one-half of the community income when she did not file a return or otherwise assume the liability for the taxes. Mitchell and Angello present that issue.

2. THIS COURT HAS NEVER CONSIDERED THE QUESTION OF THE WIFE'S LIABILITY FOR TAXES ON COMMUNITY INCOME

The question certified in Poe v. Seaborn, supra, 282 U.S. 101, was whether the husband was bound to report for income tax the entire income, or whether the spouses were entitled each to return one-half thereof. This Court answered that the husband and wife were entitled to file separate returns, each treating one-half of the community income as his or her respective incomes. This Court did not base its holding on the grounds that each spouse owned the community's property, but rather on the re-enactment of the taxing statutes after prior executive construction and the grounds that neither spouse owned the property. The Court said, at page 113:

> "We are of the opinion that under the law of Washington the entire property and income of the community can no

> more be said to be that of the husband, than it could rightly be termed that of the wife."

This was an accurate characterization of the community. Neither the husband nor the wife "own" the property of the community. The community, an entity, owns it. The husband and wife each own an interest in the community. They will become owners of the community's property, at least in Louisiana, only upon termination of the community or the husband's making a donation of the community's property to the wife.

But, a holding that the husband and wife are entitled to split the income for tax purposes because neither really owns it does not compel the further holding that the wife is required to return one-half of the income and become liable for the tax. This question of the wife's liability

was not presented to the Court in United States v. Malcolm, supra, 282 U.S. 792, or any other case.

In Malcolm, two questions were certified:

> (1) * * * must the entire community income be returned and the income tax thereon be paid by the husband?
>
> (2) Has the wife under section 161(a) of the Civil Code of California, such an interest in the community income that she should separately report and pay tax on one-half of such income?

The Court, in a per curiam opinion, answered the first question in the negative and the second in the affirmative. Malcolm relied solely upon Poe v. Seaborn, supra, Goodell v. Koch, supra, and Hopkins v. Bacon, supra.

The reason that the second question in Malcolm was pertinent was that California had amended her Civil Code to provide:

> "Section 1. A new section is hereby added to the Civil Code to be known as Section 161(a) thereof to read as follows:

> 161(a). The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172(a) of the civil code. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

Since United States v. Robbins, supra, 269 U.S. 315, had held the wife's interest in the community to be an expectancy on the basis of the California law prior to this enactment, the second question certified in Malcolm was concerned with whether or not section 161(a), supra, changed that holding. The Court found that it did.

There is no justification for saying that any of these cases were concerned with the obligation of the wife to return one-half of the community's income because she owned one-half of it. Instead, they held that the husband and wife were entitled

to split the income, for tax purposes, between them, because neither owned it.

3. IT WOULD BE ARBITRARY AND UNREASONABLE TO HOLD THE WIFE PERSONALLY LIABLE FOR TAXES ON THE COMMUNITY'S INCOME WHEN LOUISIANA LAW DOES NOT PERMIT HER ACCESS TO THE COMMUNITY'S PROPERTY

If Seaborn, Pfaff, and Malcolm were intended to hold that a wife in Louisiana is required to return one-half of the community's income and be liable out of her separate property for taxes on that income (in the absence of her assumption of that liability), [5] then those cases were wrong and should be overruled.

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[5] In Louisiana, a married woman may obligate herself personally in any form for community liabilities and should be considered to bind herself personally for community income taxes by signing a return; La. R.S. 9:103 (1950) (Appendix, infra); Friendly Loans, Inc. v. Morris, 142 So. 2d 810 (La. App. 1st Cir. 1962); Rouchon v. Rocamora, 84 So. 2d 873 (La. App. Orl. Cir. 1956).

No matter what adjectives are used to describe the wife's interest in the community, her dominion over the community's property, in her own right, during the existence of the community, is non-existent in Louisiana. It is only when the community terminates that she has a right to receive a share of the former community's property, if there be any.

During the existence of the community, the husband has the right to administer the community's affairs as he sees fit without regard to his wife's wishes. He may sell or mortgage its immovable property and with slight restriction, he may give away its movable property. Neither he nor his heirs are required to account to the wife for his mismanagement of the community unless he enriched his separate estate at the community's

expense by fraud upon the wife.[6] Conversely, the wife can neither obligate the husband nor the community unless she is acting as their agent.[7]

Short of death, separation and divorce, the wife has no means by which to terminate the community other than the suit for separation of

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[6]La. Civ. Code Art. 2404 (Appendix, infra); Pitre v. Pitre, 247 La. 594, 172 So. 2d 693 (1965); Azar v. Azar, 239 La. 941, 120 So. 2d 485 (1960); Phillips v. Phillips, 160 La. 813, 107 So. 584 (1926); Hawley v. Crescent City Bank, 26 La. Ann. 230 (1874); Davis v. Compton, 13 La. Ann. 396 (1858); Wolf v. Wolf, 12 La. Ann. 529 (1857); Belden v. Hanlon, 32 La. Ann. 85 (1880); Daggett, "The Modern Problem of the Nature of the Wife's Interest in Community Property - A Comparative Study," 19 Calif. L. Rev. 567 (1931); Evans, "The Ownership of Community Property," 35 Harvard L. Rev. 47, 63 (1921).

[7]Fernandez v. Weiner, 326 U.S. 340 (1945); Roccaforte v. Barbin, 212 La. 69, 31 So. 2d 521 (1947); Succession of James, 147 La. 944, 86 So. 403 (1920); a married woman can act as agent for her husband or for the community when authorized by her husband. La. Civ. Code Art. 1787 (Appendix, infra).

property.[8] That action, which is prospective in operation, can only be successfully maintained by the wife's showing mismanagement on the part of the husband which threatens her separate property and it can be collaterally opposed by the husband's creditors.[9]

It is because the Louisiana community property law gives the husband total control and the wife none that it makes him, but not her, liable for the community's debts.

In accordance with the community property law of Louisiana, the community is liable for the husband's debts and the husband is

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[8]La. Civ. Code Art. 2425 (Appendix, infra).

[9]Comment, 25 La. L. Rev. 77 at 244, 245 (1964) and cases cited therein; La. Civ. Code Art. 2434 (Appendix, infra).

liable for the community's debts.[10] Neither the husband nor the community is liable for the wife's debts and she is not liable for their debts[11] unless she assumes them. The wife may obligate herself for one-half of the community's debts by unconditionally accepting the community when its property is partitioned, but

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[10]Poindexter v. Louisiana & A. Ry. Co., 170 La. 521, 128 So. 297 (1930); Rouchon v. Rocamora, 84 So. 2d 873 (La. App. Orl. Cir. 1956); Gosserand v. Monteleone, 164 La. 397, 113 So. 889 (1927); Hawley v. Crescent City Bank, 26 La. Ann. 230 (1874); Succession of Baum, 11 Rob. 314 (1845); Magnolia Petroleum Co. v. Crigler, 12 So. 2d 511 (La. App. 2d Cir. 1942); Note, Creditor's Rights, 25 La. L. Rev. 201 (1964).

[11]Fernandez v. Weiner, 326 U.S. 340 (1945); Brantley v. Clarkson, 217 La. 425, 46 So. 2d 614 (1950); McCauley v. Lafleur, 205 So. 2d 458 (La. App. 3d Cir. 1967); Smith v. Viser, 117 So. 2d 673 (La. App. 2d Cir. 1960); Personal Finance Co., Inc. v. Sims, 148 So. 2d 176 (La. App. 1st Cir. 1962); Furniture Company v. Carroll, 86 So. 2d 715 (La. App. 1st Cir. 1956).

she cannot be required to do so.[12] She may accept it "with benefit of inventory", in which case she will be entitled to one-half of the property remaining after the payment of the community's debts[13] or she may renounce the community all together and neither receive any of its property nor be liable for its debts.[14]

The wife's status vis-a-vis the husband and the community is not sufficient to make her personally liable for taxes on one-half of the community's income. Her status is one imposed on her by law as part of the institution of marriage and can be avoided only by not marrying

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[12] La. Civ. Code Arts. 2409, 2410 (Appendix, infra).

[13] La. R.S. 9:2821 (1950) (Appendix, infra).

[14] La. Civ. Code Arts. 2410, 2411 (Appendix, infra); Brassac v. Ducros, 4 Rob. 335 (1843); Stuffler v. Puckett, 30 La. Ann. 811 (1878).

or finding a mate who will consent not to be governed by the community property regime.[15] Such a status cannot be compared to a commercial partnership which is consensual and subject to termination at will.

To say that the wife's interest in the community is "vested" does not enlarge her rights under the community property laws. The actualities are that the wife does not have the legal right under Louisiana community property law to obtain the information necessary to file a tax return or the funds with which to pay the tax. It would be a cruel joke upon the wife if this Court's prior characterization of her interest in the community as "vested" meant that she could be held liable for taxes on the community's

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[15]La. Civ. Code Art. 2399 (Appendix, infra).

income when the same law from which her vested interest was derived not only denied her access to the income but authorized her husband to dispose of it as he pleased.

It is submitted that it would be so arbitrary and unreasonable as to amount to a confiscation of property in violation of the due process clause of the Fifth Amendment to the United States Constitution (Appendix, infra, p.26) to require a Louisiana wife to return and be separately liable for taxes on one-half of the community's income. Accordingly, this Court should not hold that section 1(a) of the Code (Appendix, infra, p.27) imposes a tax on Mrs. Mitchell with respect of one-half of the community's income.

4. THE HUSBAND SHOULD BE HELD LIABLE FOR THE TAXES ON BOTH HALVES OF THE COMMUNITY'S INCOME

If the wife has a separate obligation to file a return and pay a tax on community income, the obligation is obviously an impossible one to perform unless she has a separate estate or her

husband provides her with the funds with which to satisfy the obligation. Poe v. Seaborn, supra, 282 U.S. 101, surely contemplated that to be entitled to split the community's income for tax purposes, the husband was required to pay the tax on both halves. Any other conclusion would leave the wife with a liability she could not satisfy while allowing the husband to satisfy his liability out of the community's property.

It does not follow that because Seaborn permitted income to be split for tax purposes that the husband could not be held liable for the total tax. Seaborn did not overrule United States v. Robbins, supra, 269 U.S. 315, which held the husband liable for tax computed on the total community income under pre-1927 California community property law. Although the Court in Robbins held that the wife's interest in the com-

munity property was an expectancy, it also found grounds upon which to tax the husband irrespective of the quantum of the wife's interest. The Court said at page 327:

> "* * * Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole. Although restricted in the matter of gifts, etc. he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. See Garrozi v. Dastas, 204 U. S. 64, 51 L. ed. 369, 27 Sup. Ct. Rep. 224. His liability for his wife's support comes from a different source and exists whether there is community property or not. That he may be taxed for such a fund seems to us to need no argument. The same and further considerations lead to the conclusion that it was intended to tax him for the whole. For not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken

> for his debts, is not liable to be taken for the wife's, Civil Code, §167, so that the remedy for her failure to pay might be hard to find. * * *"

The second ground of the Robbins decision, i.e., that the husband's power of disposition over the community property was sufficient to justify taxing him on the whole, is as valid today as it was then. Furthermore, to hold the husband liable for the tax on both halves of the community is consistent with both the Louisiana rule that income taxes on community income constitute community obligations and the rule that the husband is personally liable for the community's debts.

To hold the husband liable for the tax on both halves of the community is a more logical rule as it avoids the arbitrary result to the innocent spouse and makes it possible for the government

to collect the total tax on the community income from the community.

The government appears to concede[16] that if it remains consistent with its position here, it can collect but one-half of the tax on the community's income if the wife does not have separate property. Indeed so if it continues to insist that Seaborn and Malcolm held that the wife owns one-half of the community property and must pay tax from her own funds on one-half of its income, while at the same time the husband is permitted to pay only one-half of the tax and continue to control the whole community.

But, this conclusion is based on the erroneous premise that the Court was adjudicating the husband and wife's separate liabilities in Seaborn and Malcolm rather than their entitlement

[16]Brief for the petitioners, p. 23.

to split the community's income for tax purposes. The government contends that it would be productive of uncertainty and lack of uniformity in the tax laws to hold the husband, and thus the community, liable for the tax on both halves of the community's income.[17]

Rather than being a source of inconsistency, such a rule would promote a uniform application to a nationwide scheme of taxation. The primary source of inconsistency was the privilege of splitting the community's income, which was cured by the split income provision of 1948.

The adoption of the rule contended for here would not create any meaningful divergence of treatment between the community and non-community property state residents. Instead, it

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[17] Brief for the petitioners, p. 23.

would make the application of the income tax laws uniform throughout the states, except for the privilege of community property state residents to file separate returns.

This Court should hold that the husband's interest in the community, coupled with his powers of disposition over it, are sufficient to and do cause him to be liable for the entire tax on the community's income. Such a rule would not only be consistent with community property concepts and promote consistency of treatment between community and non-community property state residents, but would avoid the arbitrary and unreasonable result contended for here by the government.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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April, 1971

APPENDIX

United States Constitution:

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

Sec. 1. TAX IMPOSED.

(a) Rates of tax on individuals.—A tax is hereby imposed for each taxable year on the taxable income of every individual * * *.

* * * * *

California Civil Code:

Sec. 161(a). The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172(a) of the civil code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

* * * * *

Louisiana Civil Code:

Art. 1787. A married woman may act as mandatary, and her acts will bind the mandator and the person with whom she contracts, although she be not authorized by her husband; she may also act as mandatary for her husband or for the community when authorized by her husband. (As amended by Acts 1944, No. 49)

* * * * *

Art. 2399. Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

* * * * *

Art. 2404. The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an

onerous title, without the consent and permission of his wife.

He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property,

on her satisfactorily proving the fraud. (As amended by Acts 1926, No. 96)

* * * * *

Art. 2409. It is understood that, in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution.

Art. 2410. Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains.

Art. 2411. The wife, who renounces, loses every sort of right to the effects of the partnership or community of gains.

But she takes back all her effects, whether dotal or extradotal.

* * * * *

Art. 2425. The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to the mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims.

* * * * *

Art. 2434. The creditors of the husband may object to the separation of property decreed and even executed with a view to defraud them. They may even become parties to the suit for a separation of property, and be heard against it.

* * * * *

Louisiana Revised Statutes, Title 9:

§ 103. Binding themselves or disposing of or hypothecating property for benefit of

husband or community; contracts with husband

Married women may obligate themselves personally in any form, or dispose of or hypothecate their property, as security or otherwise, for the benefit of their husbands or of the community between them and their husbands.

* * * * *

§ 2821. Manner of accepting community

At the dissolution for any cause of the marriage community, the wife may accept the community of acquets and gains under the benefit of inventory, in the same manner and with the same benefits and advantages as are allowed heirs to accept a succession under the benefit of inventory.